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FOR A/S CARSON FROM THE AMBASSADOR

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TAGS: [PREL](#) [PGOV](#) [KDEM](#) [KE](#)

SUBJECT: The Constitutional Review Process and the Secretary's Calls

CLASSIFIED BY: Michael E. Ranneberger, Ambassador, DOS, EXEC; REASON:
1.4(B), (D)

¶1. (C) Summary: The Secretary's calls made and planned to Prime Minister Odinga and President Kibaki respectively influenced them to chair a meeting with their teams January 7 at which they emphasized their desire to reach compromise on the key contentious issues with respect to the draft new constitution. While that is a positive development, prospects for a successful conclusion of the constitutional revision process are at best uncertain. The political calculations and instincts of the two sides are working against compromise. As the calls demonstrate, however, the U.S. continues to have enormous influence with both sides, and continued intensive U.S. engagement can help the country move toward a non-divisive referendum. Kofi Annan is also urging the two sides to reach agreement. The stakes are very high. A divisive referendum would substantially raise the potential for violence at a time when ethnic tensions remain high, would be a terrible blow to the reform process, and would increase the likelihood of another violent electoral crisis in 2012. On the other hand, holding and obtaining approval of a referendum on a draft constitution supported by both sides would help reassure the country, send a message of commitment to fundamental reform, and help ensure future democratic stability. End summary.

¶2. (C) This message provides the latest state of play with respect to the constitutional review process. The Secretary's January 6 call to Prime Minister Odinga and her planned call to President Kibaki had an immediate positive impact. As a result of these contacts, Kibaki and Odinga chaired a meeting January 7 to focus on the contentious issues, as the Secretary urged them to do. While the meeting did not resolve the key issues, this was the first time the President and Prime Minister intervened directly; they reportedly gave direction to their high-level teams to try to reach consensus, particularly on the system of executive power, the most difficult outstanding issue. (Note: Though the Secretary had not talked with the President before the meeting, the President's private secretary had called me the day before to ask the subject of the call, and I told him it was on the constitution and the need to reach agreement on the key issues. Kibaki likely wants to have something positive to say when he talks with the Secretary. End note.)

¶3. (C) While the meeting Kibaki and Odinga chaired is a positive development, prospects for successful conclusion of the constitutional review process remain problematic at best. Many well-placed observers are increasingly negative about the prospects for a new constitution. As reported, throughout the constitutional review process we have been pressing the coalition partners to work out agreement on the contentious issues in order to present a united front to the Kenyan people and avoid a repeat of the divisive 2005 referendum. In the wake of the post-election crisis, a divisive referendum would be a large setback to the reform process, could trigger violent clashes, and would make more likely a major crisis at the time of the 2012 national elections.

¶4. (C) On January 6 I met Mohamed Abdikadir, the chairman of the Parliamentary Select Committee (PSC), which will play a key and possibly decisive role in the constitutional review process. He is a respected younger parliamentarian, and an astute analyst of political dynamics, but his actual influence is limited. As he characterized it to me, he will essentially be the "manager of the process." Abdikadir confirmed the concerns we and many other observers have about prospects for successful conclusion of the constitutional review process. There is general agreement that the draft produced by the Committee of Experts is disappointingly shoddy. That said, everyone agrees that there is no alternative but to work with the draft given the symbolic and actual importance of putting in place a new constitution to help avoid another electoral crisis in 2012.

¶5. (C) The draft constitution will go to the PSC January 8 for its review. The PSC has 21 days to review it and to send recommendations back to the Committee of Experts (COE). The COE then has 7 days to take those recommendations into account. That final draft then goes back to the PSC, and then to the full Parliament. The PSC thus has the leverage to insist that its recommendations are taken into account by the COE, since the PSC will have a second opportunity to unilaterally change the draft.

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¶6. (C) In Abdikadir's view the main issue is what type of hybrid system the constitution will have (re what will be the precise sharing of power between the President and PM). Virtually everyone agrees that this is the key issue which, if resolved, would pave the way for a non-divisive referendum. Abdikadir said he hopes the PSC can reach consensus on this issue, but he was not overly optimistic, since the President's team and the PM's team have dug in on these issues (the President's team insisting on a powerful presidency, and the PM's team insisting on more balanced sharing of power, with the balance in favor of the PM). He also agreed with the Ambassador's descriptions of the calculations both sides are making.

¶7. (C) Kibaki's PNU side believes that it has the votes in the PSC to change the draft toward a more presidential system. Failing that, the party would not mind seeing a divisive referendum and would stir up opposition to the new constitution - to include mobilizing Christian religious groups who are opposed to the inclusion of the Muslim Khadi's courts - as they are happy with the strong presidential system which exists in the current constitution.

¶8. (C) The ODM feels it is in a good position: either a new constitution passes and they take credit since they have been pushing the "hybrid" system, or it fails and the ODM then blames the PNU. Odinga wants to be a strong president anyway and so would not be unhappy if the existing constitution remained in place. Should the ODM win a divisive referendum, the victory would boost Odinga and the party's prospects in 2012. Abdikadir and most others with whom we have talked also agree that a divisive referendum would probably be worse than no referendum at all.

¶9. (C) According to participants at the January 7 meeting which Kibaki and Odinga chaired, the two emphasized their desire to see a new constitution and instructed their teams to work out the contentious issues. They did not, however, give the kind of precise guidance necessary to signal compromise. Over lunch January 7 with Foreign Minister Wetangula I discussed these issues, and he was not encouraging. Wetangula made clear his preference for a presidential system and, despite the meeting Kibaki and Odinga

chaired, was not very positive about prospects to work out a compromise on the key issues. When I spoke January 8 with Finance Minister Uhuru Kenyatta, who is a more influential player, he was somewhat more positive. Kenyatta welcomed the calls from the Secretary as important to drive the two principals to become more directly involved. On January 6 I also met with National Intelligence Director Gichangi who, while not directly involved in the constitutional review process, does exert significant influence through his briefings with the President.

¶10. (C) We are in touch with a wide range of parliamentarians, civil society, and other key actors. With all interlocutors, and publicly, we are stressing the importance we attach to the two sides reaching compromise on the contentious issues, signaling that to the PSC and COE, and then presenting a united front to the Kenyan people in order to avoid a divisive referendum. I have emphasized that successful conclusion of the constitutional review process would be welcomed by us in a big way because it would be a tremendous milestone in the reform process and greatly improve prospects for future democratic stability.

¶11. (C) The PSC had planned to hold a week-long retreat beginning January 12 to try to resolve the contentious issues. At the request of Kibaki and Odinga the PSC has agreed to postpone this for a week in order to give time for the two sides to reach agreement on the key issues. Everyone, including the PSC chairman, realize that the process will become even more polarized - and prospects for a successful completion of the process even less -- if the contentious issues are not resolved first between the President and PM.

¶12. (C) The dynamics within the PSC do not favor compromise. The PNU has a slim majority (and with the support of MPs from William

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Ruto's dissident faction of the ODM an even larger majority). Of the 27 members of the PSC, only 4 are members of the parliamentary reform caucus.

¶13. (C) Comment: We will continue to encourage and push the two sides and key parliamentarians to seek consensus compromise on the key issues. The stakes are very high. If no agreement is reached the country is likely headed to a divisive referendum that will substantially raise tensions, which could lead to significant unrest and violence. Alternatively, the holding of a non-divisive referendum would be a huge step towards ensuring the future democratic stability of the country. End comment.
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